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IN THE

Supreme Court of the United States

October Term, 1987

NICHOLAS COLAFELLA, K. LeROY IRVIS, JAMES MANDERINO, MATTHEW J. RYAN, and the BIPARTISAN COMMITTEE FOR THE ADMINISTRATION OF THE HOUSE OF REPRESENTATIVES.
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE OF THE 75th MINNESOTA SENATE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether members of an investigative committee of a state legislature, who are not themselves targets of a federal criminal investigation, may resist a federal grand jury subpoena for their investigative documents and reports served during an ongoing legislative investigation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	5
ARGUMENT	
I. The Decision of the Court of Appeals is in Conflict with this Court's Decision in *Tenney v. Brandhove* and Misconstrues this Court's Decision in *United States v. Gillock*, Which Needs to be Clarified	6
II. The Decision of the Court of Appeals Conflicts with Decisions of the United States Courts of Appeals for the First and Second Circuits	9
CONCLUSION	10

TABLE OF AUTHORITIES

Cases:

	Page
In re Grand Jury, 821 F.2d 946 (3rd Cir. 1987)	8, 9
In re Hampers, 651 F.2d 19 (1st Cir. 1981)	9
Star Distributors, Ltd. v. Marino, 613 F.2d 4 (2nd Cir. 1980)	9
Tenney v. Brandhove, 341 U.S. 367 (1951)	7-9
United States v. Gillock, 445 U.S. 360 (1980)	1-3, 6, 8-10

Constitutional Provisions:

U.S. Const. Art. I, § 6 7

Books:

2 G. M. Trevelyan, *History of England*, (3rd ed. reissue 1952) 6, 7

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INTEREST OF AMICUS CURIAE

Two standing committees of the 75th Minnesota Senate were served with subpoenas *duces tecum* issued by a federal grand jury during the 1987 legislative session. Their response to those subpoenas was governed by the decision of this Court in *United States v. Gillock*, 445 U.S. 360 (1980).

If additional subpoenas are served upon them by the same or another federal grand jury, the response of these senate committees will be governed by the decision of the United States Court of Appeals, for the Third Circuit, unless this Court grants the Petition for a Writ of Certiorari filed by members of the Pennsylvania House of Representatives. The 75th Minnesota Senate respectfully requests this Court to issue the writ so that the decision of the Court of Appeals can be reversed and the decision of this Court in *United States v. Gillock, supra,* can be properly clarified, as was done by the District Court.

During the 1987 legislative session a bill, S.F. No. 122, was introduced in the 75th Minnesota Senate to appropriate $27,000,000 from the corpus of the Northeast Minnesota Economic Protection Trust Fund to the Commissioner of Iron Range Resources and Rehabilitation for "economic rehabilitation and diversification of industrial enterprises" on the economically depressed Iron Range. It was widely assumed that the major purpose of the bill was to make money available to a company called "Endotronics, Inc." for construction of a major research and production facility on the Iron Range, although Endotronics, Inc. was not specifically mentioned in the bill and several stages of review were required before a recipient of the money was finally decided upon.

After the bill's House companion, H.F. No. 92, was passed by the Senate, as amended, the members of the Senate learned that the Federal Bureau of Investigation was investigating Endotronics, Inc. for possible fraud in its attempts to secure financing for its business ventures from private investors. The Senate recalled the bill from the House of Representatives and returned it to the Committee

on Economic Development and Housing, where it remains to this day.

After H.F. No. 92 had been returned to committee, a grand jury impaneled by the United States District Court for the District of Minnesota subpoenaed the chair of the Committee on Economic Development and Housing, as well as the chair of the Committee on Taxes and Tax Laws, to which the bill had also been referred before its passage, and commanded that they produce

> All testimony or transcripts of testimony presented to the committee regarding Endotronics, Inc. and the passage of a bill which authorized the Iron Range Resources and Rehabilitation Board to use up to 24 million dollars for economic development of Northern Minnesota.
> All documents received by the committee in support or opposition to the proposed bill.
> All correspondence or other writings from or directed to Endotronics, Inc.
> All memoranda prepared by members of the committee or any employee affiliated with the committee relating to Endotronics and/or the proposed bill. All copies of proposed contracts between Endotronics, Inc. and the IRRRB from June 30, 1987 (sic) to the present time which would include a proposed 1/87 contract for the sale of 270 Accusyst P machines to the IRRRB at $100,000 each for a total of $27,000,000.

As in the Pennsylvania case, the chairs of the committees had not been accused of any crime, so this Court's decision in *Gillock* did not necessarily eliminate their legislative immunity from judicial process. But their committees were no longer planning any action on the bill; their committees were not engaged in an investigation of Endotronics, Inc.,

other than to inquire of the Governor why he had been such a strong supporter of the bill; and none of the information that the subpoenas commanded to be produced was private or confidential or otherwise of a nature that the chairs did not want to be publicly revealed. No harm would be done to the orderly working of the legislative process by producing the documents, so the documents were produced.

The experience of the 75th Minnesota Senate shows that a federal district court, a United States Attorney, and state legislative committees can cooperate in investigating possible criminal activity without harming any of their respective functions. However, the 75th Minnesota Senate is gravely concerned that a less conscientious United States Attorney might frustrate a legislative committee from doing its constitutional duty. Where, as in Pennsylvania, a legislative committee has been diligently performing its duty to gather facts relevant to the need for future legislation, and has discovered evidence of crimes possibly having been committed, there will be a temptation for a less conscientious prosecutor to rest on the work done by the committee and not undertake his own independent investigation. If the committee is still performing its duty, as was the committee of the Pennsylvania House, the intervention of the United States Attorney might prevent it from properly completing its work. Where the information sought by the prosecutor is readily available directly from the sources used by the committee, there is no compelling reason why the committee should be diverted from its own constitutional duties just to make it easier for the United States Attorney to do his.

While the members of the 75th Minnesota Senate are concerned about the immediate damage that a less conscien-

tious United States Attorney could do to their lawmaking function, they are even more concerned about the long-term damage that could result if the United States Attorney were allowed free access to their confidential documents and conversations with constituents. The decision of the Court of Appeals in this case not only refuses to recognize a qualified speech or debate privilege for state legislators under federal common law, it also refuses to recognize a confidentiality privilege for state legislators. Unsure that their communications will remain confidential, the people may become reluctant to confide in their legislators. Their ability to petition their state legislature for a redress of grievances will be abridged.[1]

STATEMENT OF THE CASE

The 75th Minnesota Senate essentially adopts the petitioners' statement of the case, but calls the Court's attention to a few salient facts.

The subpoena at issue in this case was not searching for evidence of criminal misconduct by a legislator. The members of the legislative committee upon which the subpoena was served were not the targets of the grand jury's inquiry; there is no suggestion that they had done anything wrong.

The members of the legislative committee upon which the subpoena was served were already engaged in a duly authorized and bona fide investigation of their own into subject matter within their jurisdiction. Not until the legislative committee was three years into its investigation was the interest of the United States Attorney aroused; aroused because of the work that the legislative committee

[1]Under Rule 36 of the Rules of the Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

was doing. The United States Attorney could have been engaging in his own investigation of the subject matter, but the legislative committee got their first!

The legislative committee was in hot pursuit of its quarry. Substantial information had already been released to the public, and was provided to the United States Attorney. But the committee also possessed information that it did not intend to make public until produced at its own hearings within the next two weeks. The United States Attorney refused to allow the committee to pursue its inquiry in accordance with the schedule it had developed over the previous three years and instead commanded that all this information be produced immediately.

The documents sought are not merely the fruit of the legislative committee's labor, they include the committee's own memory of its labor, as shown by internal memoranda, interview notes, record review notes, and correspondence. The United States Attorney seeks to know, not only what the legislative committee knows, but how it found out what it knows.

ARGUMENT

I.

The Decision of the Court of Appeals is in Conflict with this Court's Decision in Tenney v. Brandhove and Misconstrues this Court's Decision in United States v. Gillock, Which Needs to be Clarified.

The political concept of legislative independence was most forcefully stated by the English Parliament on January 30, 1649, when Charles I was beheaded according to its order. *See* 2 G.M. Trevelyan, *History of England* 179-

203 (3rd. ed. reissue 1952); *Tenney v. Brandhove,* 341 U.S. 367, 372 (1951). It was codified as the legal doctrine of legislative immunity in the English Bill of Rights in 1689 as

> That the Freedom of Speech, and Debates or proceedings in Parliament, ought not to be impeached or questioned in any Court of Place out of Parliament. (Quoted in *Tenney v. Brandhove,* 341 U.S. 367, 372 (1951).)

What was achieved in England by force of arms was carried to the United States by force of reason and continued in the Articles of Confederation as

> Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress. *Id.*

and included in the United States Constitution, Article I, Section 6, as

> [F]or any speech or debate in either house [the members] shall not be questioned in any other place.

Although legislative immunity for members of Congress thus has a basis in the United States Constitution, and legislative immunity for members of a state legislature has a basis in the constitutions of most states, *see Tenney v. Brandhove,* 341 U.S. 367, 375-76 n. 5 (1951), this Court recognized in *Tenney* that legislative immunity is not simply a matter of codified constitutional law — it is also a part of the federal common law. It is not a doctrine that needs now to be created by the courts, but rather one whose historical meaning needs only to be explained by the courts "in the light of reason and experience." Fed. R. Civ. P. 501.

In *United States v. Gillock*, 445 U.S. 360 (1980), this Court made clear that, in a federal prosecution, the privileges of a state legislator are governed by federal common law, rather than by either the Speech or Debate Clause of the federal constitution or a speech or debate clause in the state's constitution. When considering what federal common law evidentiary privileges were available, you considered the reasons for the constitutional privileges: separation of powers and legislative independence. *Id.* at 369. When considering the first reason, you found that the doctrine of separation of powers, simply did not apply to the *federal* prosecution of a *state* legislator, since "the Supremacy Clause dictates that federal enactments will prevail over competing state exercises of power." *Id.* at 370. But when considering the second reason, you balanced the need for legislative independence against the need to enforce the federal criminal statutes. You found that, where recognizing the privilege would cause evidence of criminal conduct by a legislator to be excluded from proof at trial, "recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal Government in enforcing its criminal statutes with only speculative benefit to the state legislative process." *Id.* at 373. Therefore, you refused to recognize it in that case.

In this case, the Court of Appeals made no mention of *Tenney v. Brandhove* and this Court's recognition of the speech or debate privilege for state legislators as part of the federal common law. The Court of Appeals criticized the District Court for not having decided "whether a qualified privilege exists or should exist." *In re Grand Jury*, 821 F.2d 946, 955 (3rd Cir. 1987). Instead, the Court of Appeals focused on whether is should *create* a speech or debate privi-

lege for state legislators based on what it found in the United States Constitution for members of Congress. Instead of reviewing a page of history it wrote less than a volume of logic and concluded that, contrary to *Tenney*, "we do not believe that the needs of state legislators for confidentiality justify the creation of a qualified privilege for the full range of legislative activities normally protected by the Speech or Debate Clause." 821 F.2d at 958.

The Court of Appeals misconstrued *Gillock* as having undermined the rationale for a federal common law speech or debate privilege for state legislators in all criminal cases, rather than only in prosecutions where a legislator was the target.

This Court should act now to clarify that, even after *Gillock*, a qualified speech or debate privilege for state legislators still lives in the federal common law.

II.

The Decision of the Court of Appeals Conflicts with Decisions of the United States Courts of Appeals for the First and Second Circuits.

The 75th Minnesota Senate adopts the argument of petitioners, Petition 12-14, more fully describing how the decision below conflicts with decisions of the United States Courts of Appeals for the First and Second Circuits in the cases of *Star Distributors, Ltd. v. Marino*, 613 F.2d 4 (2nd Cir. 1980); and *In re Hampers*, 651 F.2d 19 (1st Cir. 1981).

CONCLUSION

This Court should grant certiorari to clarify the reach of its decision in *United States v. Gillock* and resolve the conflict among the circuit courts on this important question of federal common law.

Respectfully submitted,

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